No. 18-966

In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. The decisions below warrant this Court's review 1
B. The case should proceed on an expedited basis 11

TABLE OF AUTHORITIES

Cases:

Bennett v. *Spear*, 520 U.S. 154 (1997) 3
Clapper v. *Amnesty Int'l USA*, 568 U.S. 398 (2013) 3
FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) 6, 8
Jagers v. *Federal Crop Ins. Corp.*, 758 F.3d 1179 (10th Cir. 2014) 8
National Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644 (2007) 9
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 2
Tucker v. *United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 506 U.S. 953 (1992) 4
Webster v. *Doe*, 486 U.S. 592 (1988) 4

Constitution, statutes, and rules:

U.S. Const. Art. III 2
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 2
5 U.S.C. 701(a)(2) 4
Census Act, 13 U.S.C. 1 *et seq.* 4
13 U.S.C. 6(c) 2, 9
13 U.S.C. 9(a) 3
13 U.S.C. 141(f) 2, 9, 10, 11
13 U.S.C. 141(f)(1) 10
13 U.S.C. 141(f)(2) 10, 11

Statutes and rules—Continued: Page

13 U.S.C. 141(f)(3) 11
13 U.S.C. 221 ..... 2, 4
Voting Rights Act of 1965, 52 U.S.C. 10301 *et seq.* (Supp. V 2017) 6
Sup. Ct. R.:
Rule 10(c) 1, 2
Rule 25.2 12

In the Supreme Court of the United States

No. 18-966

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents agree (N.Y. Br. 33-34; ACLU Br. 36-37) that to ensure adequate time for orderly plenary review, this Court should grant the government's petition for a writ of certiorari before judgment *if* the questions presented would warrant review following the court of appeals' judgment. They would. This Court should be the final arbiter of the novel questions in this important case.

A. The Decisions Below Warrant This Court's Review

Certiorari is warranted when a lower court "has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Respondents agree that the decennial census "is undoubtedly a matter 'of imperative public importance.'" ACLU Br. 16 (citation omitted). Indeed, the effect of the district court's decision is that the government will be disabled for a decade from obtaining citizenship data

through an enumeration of the entire population. Respondents also do not dispute that several of the district court's holdings are novel and that, before this case, no federal court ever had entered an order dictating the contents of the decennial census questionnaire. See Pet. 14-16.

Moreover, the district court decided several "important federal question[s]" in ways that are at least in significant tension, if not in outright "conflict[]," with "relevant decisions of this Court." Sup. Ct. R. 10(c). Specifically, the district court erred in finding that respondents had standing to challenge the inclusion of a question on the decennial census form; that challenges to census questions are judicially reviewable; that the Secretary's decision to reinstate the citizenship question was arbitrary and capricious; that the Secretary's decision was pretextual; and that the Secretary's decision violated 13 U.S.C. 6(c) and 141(f). Each of those rulings is contrary to the controlling principles set forth in this Court's precedents interpreting Article III and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

1. a. i. As the government has explained (Pet. 17-18), respondents do not have standing because their alleged injuries will materialize only if unidentified third parties react to the citizenship question by illegally refusing to fully answer and return the census questionnaire in violation of federal law, see 13 U.S.C. 221. Accordingly, respondents' alleged injuries would not be "fairly attributable" to the Secretary's decision to reinstate the citizenship question to the decennial census; they would be attributable to the unlawful decisions of these independent third parties. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).

Respondents suggest that standing may exist when the third-party actions causing the alleged injuries are themselves "predictable," N.Y. Br. 20 (emphasis omitted), or "foreseeable," ACLU Br. 21, results of the challenged conduct. But that is insufficient to support standing when, as here, the third-party actions are both unlawful and—according to respondents themselves—caused solely by the third parties' speculative fears that their answers will be used against them for immigration enforcement, notwithstanding the census's stringent confidentiality protections, 13 U.S.C. 9(a). See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 (2013) (rejecting rejected "standing theories that rest on speculation about the decisions of independent actors"). Respondents' standing thus depends on third parties' acting unlawfully out of fear that the government, too, will act unlawfully.

Respondents' reliance (ACLU Br. 20) on *Bennett* v. *Spear*, 520 U.S. 154 (1997), is misplaced. *Bennett* reiterated the principle that standing cannot rest on alleged injuries that are the "'result of the *independent* action of some third party not before the court,'" but acknowledged that an "injury produced by determinative or coercive effect upon the action of someone else" could support standing. *Id.* at 169 (brackets and citation omitted). The plaintiffs in *Bennett* thus had standing to challenge an opinion by the Fish and Wildlife Service that would have "a powerful coercive effect on" the Bureau of Reclamation (another agency within the Department of the Interior), whose actions would cause the alleged injury to the plaintiffs. *Ibid.* No such coercive effect is present here. If anything, coercion runs the other way: the government coerces residents (under

pain of criminal penalty) to fully and truthfully answer the decennial census questionnaire. 13 U.S.C. 221.

ii. Even if respondents had standing, the Secretary's determination of what questions to include on the decennial census "is committed to agency discretion by law" and is thus judicially unreviewable. 5 U.S.C. 701(a)(2); see Pet. 19-20. Respondents purport to list (N.Y. Br. 21-22 & n.3; ACLU Br. 22 n.2) a series of cases finding "meaningful standards to review the Secretary's decisions about the 'form and content' of the census," N.Y. Br. 21 (citation omitted), but those cases involved questions of *apportionment*—not challenges to the contents of the questionnaire.

Moreover, the district court deemed the Secretary's decision to reinstate the citizenship question arbitrary and capricious based on the purported lack of accuracy in the census tally that would result. But as the Seventh Circuit has explained, the Constitution, the Census Act, 13 U.S.C. 1 *et seq.*, and the APA are "[s]o nondirective * * * that there is no law for a court to apply" to determine how accurate a census must be. *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1417, cert. denied, 506 U.S. 953 (1992). Respondents attempt to distinguish *Tucker* on the ground that it involved a "statistical method," N.Y. Br. 23 n.5 (citation omitted), and "did not address" the "specific sections" and issues in this case, ACLU Br. 24. Those distinctions are irrelevant. If there is no law to apply to determine when the Secretary has struck the appropriate balance between accuracy, cost, and the desirability of collecting certain demographic information, it does not matter what specific section is in dispute—the issue is judicially unreviewable. 5 U.S.C. 701(a)(2); *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

b. The district court also erred in finding the Secretary's decision arbitrary and capricious. Respondents do not dispute that the census has from its inception been used to collect additional useful demographic information—including, for many decades, about citizenship. See Pet. App. 16a-17a. It was not arbitrary and capricious for the Secretary to reinstate a long-standing and unremarkable citizenship question to the decennial census.

i. Respondents repeat the district court's primary conclusion (Pet. App. 289a-292a) that the evidence before the Secretary at the time of his decisional memorandum "contradicts the Secretary's assertion" that "using [data in state and federal] administrative records and [asking] a citizenship question would produce more accurate and complete citizenship data than using administrative records alone." N.Y. Br. 25; see *id.* at 25-27; ACLU Br. 26-28. But like the district court, respondents misread the actual evidence before the Secretary. In a March 2018 memorandum, the Census Bureau estimated that without the citizenship question, it would be able to link the citizenship data of some 295 million people, leaving the citizenship of roughly 35 million people to be "modeled." Pet. App. 55a. But with the question, the Bureau estimated that it would need to model citizenship data for only 13.8 million people. *Id.* at 56a. That is an obvious improvement in citizenship data quality.

To be sure, the Bureau's memo predicts that asking the question "would produce *more* people who could not be linked to administrative records," ACLU Br. 27 (citation omitted): 36 million if the question were asked, compared to 35 million if it were not, Pet. App. 56a. Yet the memo also estimates that 22.2 million of them *will*

answer the citizenship question on the decennial census, thereby providing the Census Bureau data it otherwise would not be able to obtain. *Ibid.* The district court discounted the benefits of this massive increase in self-responses because "just under 500,000" of the 22.2 million responses would be inaccurate. *Ibid.* But whether that inaccuracy outweighs the benefits of obtaining at least 21.7 million concededly accurate citizenship responses that the Bureau otherwise could not obtain is, at bottom, a policy judgment left to the discretion of the Secretary—not a court. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009); see Pet. App. 562a.

ii. Respondents argue (N.Y. Br. 26-27; ACLU Br. 32-33) that the Secretary did not consider whether it is "necessary" to obtain block-level citizenship data for the Department of Justice (DOJ) to enforce the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.* (Supp. V 2017). But as the government has explained (Pet. 22-23), the Secretary was entitled to rely on DOJ's formal request that such data *would* be useful for its VRA enforcement efforts—and its representation that citizenship data from the long-form questionnaire was used for this purpose from 1970 to 2000. Pet. App. 566a. Respondents are thus incorrect to suggest (N.Y. Br. 27; ACLU Br. 32) that DOJ has never used census-derived citizenship data "during the entire fifty-four year history of the VRA."

Besides, under respondents' logic, the Secretary of Commerce could never ask *any* additional questions on the census to aid VRA enforcement efforts, no matter how helpful they might be, since DOJ has managed to get by without them for 54 years. The APA does not

ossify the census questionnaire or curtail the Secretary's discretion in that manner. Indeed, as even the district court seemed to recognize (Pet. App. 271a), respondents' logic would render unlawful nearly every demographic question on the census, contrary to the venerable history of collecting useful and interesting demographic information through the decennial census.

iii. Echoing the district court (Pet. App. 286a), respondents argue that "the Secretary's contention that 'no one provided evidence' that adding a citizenship question 'would materially decrease response rates'" was "'simply untrue.'" N.Y. Br. 24 (citations omitted); see ACLU Br. 25. But the Secretary did not so contend in his decisional memorandum. What the Secretary actually said was that "no one provided evidence that reinstating a citizenship question on the decennial census would materially decrease response rates *among those who* generally distrusted government and government information collection efforts, disliked the current administration, or feared law enforcement." Pet. App. 557a (emphasis added). The Secretary's point about a "material[] decrease [in] response rates" was thus limited to a particular subgroup of the population: "residents who already decided not to respond" "regardless of whether the decennial census includes a citizenship question." *Id.* at 557a-559a. The Secretary separately acknowledged the belief, held by some, that there "had to exist" "residents who would respond accurately to a decennial census that did not contain a citizenship question but would not respond if it did." *Id.* at 558a. He observed, however, that "there is no information available to determine the number of" such people and "no one has identified any mechanism for making such a determination." *Ibid.*

In any event, respondents and the district court overlook that the Secretary ultimately concluded that *even if* the fears of an undercount were to bear out, obtaining more "complete and accurate" citizenship data from the decennial census "is of greater importance than any adverse effect that may result from people violating their legal duty to respond." Pet. App. 562a. The Secretary thus made a policy judgment to balance competing priorities in a particular manner. Especially given the lack of any discernible standards in the Census Act for reviewing that policy choice, respondents' disagreement is not a license "to substitute [their] judgment for that of the agency." *Fox Television*, 556 U.S. at 513 (citation omitted).

c. As the government has explained (Pet. 25-26), the district court erred in finding the Secretary's reasons for reinstating the citizenship question "pretextual" because respondents did not make a showing that the Secretary *disbelieved* the VRA rationale. Respondents do not meaningfully address this point, and instead simply repeat the court's erroneous conclusion that because the Secretary purportedly had additional motivations for his decision, his decision was pretextual. See ACLU Br. 34-35; N.Y. Br. 28-30. That is not enough under the APA to set aside agency action. See *Jagers* v. *Federal Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014).

The public respondents briefly argue (N.Y. Br. 29) that "DOJ did not genuinely want accurate citizenship data" because it "refused to meet with the Bureau" about its request. But DOJ officials' decision that a meeting with the Census Bureau was unnecessary says nothing about whether they wanted the citizenship data from the question they requested, let alone that *Secretary*

Ross disbelieved DOJ's stated rationale. Indeed, Secretary Ross expressly relied on DOJ's letter in his decisional memorandum, and respondents still cannot identify any evidence—in the administrative record or otherwise—that the Secretary thought DOJ's need for the data was anything but "genuine." *Ibid.*

d. The district court also erred in finding the Secretary's decision to have violated 13 U.S.C. 6(c) and 141(f). See Pet. 24-25.

i. Among other reasons, the Secretary did not violate Section 6(c) because he fully explained why administrative records alone would not satisfy "the kind, timeliness, quality and scope" requirements of the requested citizenship data, 13 U.S.C. 6(c), even though he did not cite the provision. Pet. App. 550a (currently available data "are insufficient in scope, detail, and certainty"); see *id.* at 554a-556a; cf. *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (courts must "uphold a decision" even if it is "of less than ideal clarity" as long as "the agency's path may reasonably be discerned"). Respondents again rely on the erroneous assertion that asking the citizenship question "'would produce *less accurate citizenship data*' than relying on administrative records alone." N.Y. Br. 31 (citation omitted); see ACLU Br. 29-30. As noted above, that is incorrect.

Regardless, the statute is best read to require only that the Secretary exhaust available administrative records "[t]o the maximum extent possible" before making direct inquiries (as his decisional memorandum says he will do), and at most requires *the Secretary*—not a court—to make a determination that those records are inadequate in "kind, timeliness, quality and scope." 13 U.S.C. 6(c). Here, the Secretary reasonably determined that

obtaining accurate citizenship responses from at least 21.7 million additional residents (per the district court's own findings, Pet. App. 56a)—made possible only by asking the citizenship question—would provide the "kind" and "scope" of data that administrative records alone could not provide. That determination is not subject to judicial second-guessing.

ii. Similarly, the Secretary's informational reports to Congress under Section 141(f) are not judicially reviewable. See Pet. 25. Private respondents say only that they are challenging not "the substantive 'adequacy' of a report, but the failure to file one at all." ACLU Br. 30 (citation omitted). That is inaccurate. Respondents conceded, and the district court found, that the Secretary *did* timely file reports to Congress under Section 141(f)(1) and (2). Pet. App. 274a. So respondents' challenge (as they now characterize it) is belied by the uncontested facts.

The public respondents claim that reports under Section 141(f) are judicially reviewable because they "have the legal consequence of binding the Secretary to the subjects and questions he specifies" in those reports. N.Y. Br. 32. That is incorrect. No provision of the Census Act limits the Secretary's discretion to ask questions on the decennial census based on whether his reports to Congress comply with Section 141(f). Moreover, the census questionnaire includes only "questions," not "subjects." 13 U.S.C. 141(f)(1) and (2). Respondents agree that the Secretary included the proposed citizenship *question* in his Section 141(f)(2) report to Congress. Pet. App. 274a. So even if the Secretary could ask only the questions listed in the Section 141(f) reports, N.Y. Br. 32, it would not prevent his ask-

ing the citizenship question here. At all events, the Secretary can satisfy Section 141(f) by submitting additional reports to Congress "after submission of a report under paragraph (1) * * * and before the appropriate census date." 13 U.S.C. 141(f)(3). By including the citizenship question in his Section 141(f)(2) report to Congress, the Secretary necessarily satisfied this requirement and so did not violate Section 141(f)(1) at all.

2. Respondents urge (N.Y. Br. 34; ACLU Br. 35-36) the Court to deny the second question presented about extra-record evidence—a question that this Court already recognized as meriting review when it granted certiorari in No. 18-557. Because respondents refuse to disclaim reliance on the extra-record evidence as alternative grounds for affirmance, the question is not moot. See Pet. 26-28. Respondents themselves previously assured the Court that it could review these issues after a final judgment. See 18-557 N.Y. Br. in Opp. 16-17; 18-557 N.Y.I.C. Br. in Opp. 13-14.

B. The Case Should Proceed Or An Expedited Basis

If this Court grants the petition for a writ of certiorari before judgment, the case should proceed on an expedited schedule. Assuming the petition is granted by February 22, 2019, the government has proposed a schedule to enable argument to be heard during the Court's scheduled April sitting that would give the parties an equal amount of time—21 days—to prepare their respective briefs, with 12 days for the government to prepare and file its reply. See Gov't Mot. for Expedited Consideration 6 (proposing a briefing schedule of March 15, April 5, and April 17 for the opening, response, and reply briefs, respectively). Respondents' proposed schedule (N.Y. Br. 36; ACLU Br. 37) would cut the government's time for an opening brief to just

17 days—and the time for a reply to just seven days—while allowing themselves a full 30 days to prepare their briefs. That is an inequitable division of time and the Court should reject it.

Respondents' proposed schedule for a special May sitting (N.Y. Br. 36; ACLU Br. 37) similarly would leave the government just seven days for a reply brief, while allowing themselves 35 days to prepare their briefs—even more than what they would have without expedition, see Sup. Ct. R. 25.2. That, too, is inequitable.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari before judgment should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

FEBRUARY 2019